Supreme Court, U.S.
FILED
DEC 31 1991
OFFICE OF THE CLERK

(3)

No. 91-751

In the Supreme Court of the United States

OCTOBER TERM, 1991

SULTAN ALLIBHAI and YASMIN ALLIBHAI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

MERVYN HAMBURG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-3746

QUESTION PRESENTED

1. Whether the Due Process Clause requires that the government have reasonable suspicion that a person has engaged or will engage in criminal activity before the government may initiate a criminal investigation of that person.

2. Whether the government initiated the investigation of petitioners because of their religion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Employment Division Dep't of Human Resources v. *Smith*, 494 U.S. 872 (1990)	8
Hampton v. *United States*, 425 U.S. 484 (1976)	7
United States v. *Chin*, 934 F.2d 393 (2d Cir. 1991)	6
United States v. *Driscoll*, 852 F.2d 84 (3d Cir. 1988)	6, 7
United States v. *Gamble*, 737 F.2d 853 (10th Cir. 1984)	7
United States v. *Jacobson*, 916 F.2d 467 (8th Cir. 1990), cert. granted, 111 S. Ct. 1618 (1991)	6, 7
United States v. *Jannotti*, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982)	7
United States v. *Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985)	7
United States v. *Luttrell*, 923 F.2d 764 (9th Cir. 1991)	6
United States v. *Miller*, 891 F.2d 1265 (7th Cir. 1989)	6
United States v. *Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980)	7
United States v. *Osborne*, 935 F.2d 32 (4th Cir. 1991)	6
United States v. *Payner*, 447 U.S. 727 (1980)	7
United States v. *Russell*, 411 U.S. 423 (1973)	7
United States v. *Thoma*, 726 F.2d 1191 (7th Cir.), cert. denied, 467 U.S. 1228 (1984)	7
Wayte v. *United States*, 470 U.S. 598 (1985)	9

Constitution and statutes:

	Page
U.S. Const. Amend. I	5, 8, 9
Free Exercise Clause	5
18 U.S.C. 371	2
18 U.S.C. 1343	2
18 U.S.C. 1956(a)(2)(A)	2
18 U.S.C. 1956(a)(3)	2
31 U.S.C. 5313(a)	2
31 U.S.C. 5316	2, 8

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-751

SULTAN ALLIBHAI and YASMIN ALLIBHAI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-17, is reported at 939 F.2d 244.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1991. The petition for a writ of certiorari was filed on November 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner Sultan Allibhai was convicted on 22 counts charging

conspiracy, money laundering, failing to file Internal Revenue Service currency transaction reports, travel in interstate commerce with intent to carry on unlawful activities, and wire fraud, in violation of 18 U.S.C. 371, 1343, 1956(a)(2)(A) and (a)(3), and 31 U.S.C. 5313(a). Yasmin Allibhai, Sultan's wife, was convicted on three counts charging conspiracy, failing to file IRS currency transaction reports, and failing to file a customs report when exporting more than $10,000, in violation of 18 U.S.C. 371, 31 U.S.C. 5313(a), and 31 U.S.C. 5316. Sultan Allibhai was sentenced to concurrent terms of imprisonment totaling 136 months. Yasmin Allibhai was sentenced to concurrent terms totaling 30 months' imprisonment. The district court imposed a three-year period of supervised release as to each petitioner. The court of appeals affirmed.

1. a. In May 1987, British customs officials notified the United States Customs Service that for a number of years Nizamudin Allibhai (who is not related to petitioners) had been transferring about $1,000,000 per month illegally from the Dallas-Fort Worth area to London, England. The British authorities also reported that they were investigating petitioner Sultan Allibhai and one of his businesses. Gov't C.A. Br. 3.

In June 1987, Nizamudin Allibhai arrived in London with $928,000 in cash. British customs officers informed American authorities of the serial numbers of some of the bills, and the Internal Revenue Service determined that all of the bills had been issued by a bank near the Dallas airport. IRS agents discovered that Nizamudin Allibhai had no account at that bank, but that petitioners were signatories on several corporate accounts with that bank. That information led the IRS to begin an investigation of petitioners. Gov't C.A. Br. 3-4.

b. In March 1988, IRS agents recruited Bahadurali Hassam to assist them in detecting money launderers in the Dallas area. The agents recited a list of names to Hassam and asked whether he recognized any of them. Hassam recognized some of the names, including Sultan Allibhai. Hassam told the agents that he knew of no wrongdoing by Sultan Allibhai. Hassam added that he and Sultan Allibhai were members of the Ismaili Muslim religious faith, and that it was not uncommon for a co-religionist who had a retail business to talk openly during social events or following religious ceremonies about skimming money. Hassam agreed to pretend to be a money launderer in search of an outlet to launder funds consigned to him. He also consented to contact Sultan and others on the list of suspects. Gov't C.A. Br. 4-5.

On April 2, Hassam attended a wedding in Dallas; petitioners also were wedding guests. After the wedding, petitioners met Hassam in his hotel room where they renewed acquaintances and discussed various subjects, including money laundering. Hassam told Sultan Allibhai that he was looking for people who knew how to launder money. Sultan replied, "Why ask about the other people. This is my business. I have been doing it from Africa. You know me, we go back a long way." Sultan offered to charge a fee of only 2½ percent for laundering money although the prevailing rate was twice that amount. Gov't C.A. Br. 5-6. Thereafter, Hassam provided petitioners with government funds, which petitioners laundered. Gov't C.A. Br. 6-11.[1]

---

[1] The first transaction was in the amount of $50,000. Petitioner Sultan Allibhai took the money to a brokerage house in Brussels, Belgium. He turned the money over to his contact,

The government subsequently decided to phase out Hassam and to substitute an undercover agent to act as the provider of the money to be laundered. On June 7, Hassam introduced petitioner Sultan Allibhai to undercover agent Ralph Jacoby. Sultan told Agent Jacoby that he had an experienced money laundering operation and that the money would be returned within seven working days. Agent Jacoby transferred $200,000 to Sultan, together with a $5,000 fee. Sultan demanded a 4 percent fee in the future. In mid-June, the money was delivered to the Brussels brokerage house by Sultan's associate. By June 23, the money had been returned by wire transfer to the Florida undercover bank account. Gov't C.A. Br. 11-13.

On seven more occasions between late June and September 1988, Agent Jacoby furnished petitioner Sultan Allibhai with amounts ranging from $95,000

---

who arranged for a wire transfer of the funds from the brokerage house's account in a Swiss bank to an undercover account at a bank in Florida. The $50,000 was received by the undercover account on April 27. Gov't C.A. Br. 7-9.

On May 25, Hassam delivered $100,000 in government funds to petitioner Yasmin Allibhai. He also furnished the number of an undercover account in California, to which the laundered money was to be sent. Three days later Yasmin took the money to the brokerage house in Brussels. At the time of her departure from the United States she did not disclose to the customs officers, as required by law, that she was in possession of more than $10,000. Gov't C.A. Br. 9-10.

On June 6, Hassam notified petitioner Sultan Allibhai that the bank in California had not confirmed the receipt of $100,000. Sultan replied that the same laundering system had been employed and that he believed the receipt of a confirmation from the bank to be imminent. The brokerage house in Brussels transferred the $100,000 by wire to the California bank that day. Gov't C.A. Br. 10-11.

to $211,000 for laundering. On each occasion Sultan arranged for the money to be transferred to an undercover bank account either by way of the brokerage house in Brussels or with the aid of an associate at the Toronto Currency Exchange. After a hiatus, the laundering activity resumed in May 1989. Sultan received $100,000 and a fee that had risen to 7 percent. That money was successfully laundered through the brokerage house in Brussels. On June 19, Sultan met with Agent Jacoby, expecting to receive more than $1,000,000. Instead, Sultan was arrested. Gov't C.A. Br. 13-22.

2. The court of appeals affirmed. Pet. App. 1-17. The court rejected petitioners' claim that the Constitution requires that the government have reasonable suspicion that a person has committed or will commit a crime before the government may investigate that person. *Id.* at 4-7. The court also rejected petitioners' claim that they were investigated because they are Ismaili Muslims. The court ruled that because the First Amendment Free Exercise Clause does not except Ismaili Muslims from neutral, generally applicable criminal laws, the fact that an investigation incidentally targets members of a specific religious group does not violate the First Amendment. *Id.* at 8.

ARGUMENT

1. Petitioners maintain that their convictions must be set aside because the government had no reason to suspect that they had been or would be involved in criminal activity before the government conducted an undercover investigation of them. Pet. 6-9. Contrary to petitioners' claim, no such reasonable suspicion is required, and the government's investigation was wholly proper.

a. There is no conflict among the circuits on the question whether the government must have reasonable suspicion that a person has committed or will commit an offense before the government may commence an investigation of that person. Every court of appeals to consider the issue, including the Fifth Circuit in this case, has rejected the contention that the Constitution imposes such a reasonable suspicion requirement. *United States* v. *Osborne*, 935 F.2d 32, 35-36 (4th Cir. 1991); *United States* v. *Chin*, 934 F.2d 393 (2d Cir. 1991); *United States* v. *Luttrell*, 923 F.2d 764 (9th Cir. 1991) (en banc); *United States* v. *Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (en banc), cert. granted on other grounds, 111 S. Ct. 1618 (1991) (No. 90-1124);[2] *United States* v. *Miller*, 891 F.2d 1265, 1269 (7th Cir. 1989); *United States* v. *Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988);

---

[2] The Court limited its grant of certiorari in *Jacobson* to the question whether petitioner was entrapped as a matter of law. Nevertheless, petitioner and amici in *Jacobson* discussed the reasonable suspicion question presented by the certiorari petition in this case. We also addressed that question after pointing out that it was not properly before the Court. Because the Court did not grant review in *Jacobson* to decide the reasonable suspicion question, this Court need not hold the petition in this case pending the Court's decision in *Jacobson*.

United States v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Thoma*, 726 F.2d 1191, 1198 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); *United States* v. *Jannotti*, 673 F.2d 578, 609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 940-941 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

b. There is no merit to petitioner's claim. In *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), this Court noted that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." The Court in *Russell* held, however, that no such due process violation was shown in that case. In fact, this Court has never found an investigative technique to be so offensive as to violate due process and to prohibit the government from prosecuting the defendant, in spite of several invitations to do so. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980). In any event, simply initiating an investigation without any prior suspicion of wrongdoing has never been held to violate due process. Because an individual "has no constitutional right to be free of investigation," *United States* v. *Jacobson*, 916 F.2d at 469, when "the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait," *United States* v. *Driscoll*, 852 F.2d at 87.

c. Even if this Court were to adopt the rule that a suspicionless investigation violates due process, pe-

titioners would not benefit from such a rule. Before petitioners became the subjects of the undercover investigation, the government had reasonable suspicion that they would become involved in money laundering. In mid-1987, the government received information from British customs officials that the British government was investigating a Sultan Allibhai and one of his corporations for money laundering, and that an investigation of Nizamudin Allibhai's money laundering activities resulted in the discovery that money he had spirited away to Great Britain had been obtained from a bank in which he did not have an account, but in which petitioners and their corporations did. That information warranted a suspicion that petitioners may have been involved in Nizamudin Allibhai's misconduct.

2. Section 5316 of Title 31 requires that a bearer of funds report that he is carrying more than $10,000 when departing this country. That statute is precisely the type of neutral, generally applicable law that can be applied to the members of a religious organization without violating the First Amendment. See *Employment Division Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). Petitioners do not argue to the contrary. Instead, they claim that they were made the subject of this investigation because they are Ismaili Muslims. Pet. 9-14. Based on that conclusory allegation, petitioners challenge the right of the government to investigate ethnic or religious groups without reasonable suspicion, and they urge the Court to adopt a rule barring such investigations on First Amendment grounds.

The short answer to petitioners' argument is that the record does not support their premise. To establish a claim of discriminatory law enforcement, peti-

tioners have the burden of establishing that the government's investigation had both a discriminatory effect and a discriminatory purpose. See *Wayte* v. *United States*, 470 U.S. 598, 608-610 (1985). Petitioners have failed to carry that burden. There is no doubt that petitioners, Nizamudin Allibhai, and Hassam all were members of the Ismaili Muslim sect. It also may be true, as petitioners assert, Pet. 3-4 n.1, that members of that sect must tithe to the Aga Khan and that tithes are sent abroad to places where the Aga Khan can gain access to the funds. But that is beside the point. Nothing in the record shows that the government initiated this investigation to stifle the flow of properly recorded funds to the Aga Khan, instead of for the legitimate purpose of determining whether petitioners were laundering money, whatever its ultimate destination might be. And there was no evidence that any of the money transfers in which petitioners engaged related to their alleged religious obligations. Under these circumstances, petitioners have not stated a valid First Amendment claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

MERVYN HAMBURG
Attorney

DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45227